rea being a necessary element in every criminal offence has been much weakened in modern times, and that the rule now is to consider the object of the statute and the ordinary grammatical meaning of the language employed. To my mind the absence of the word 'knowingly' from section 9 of the Opium and Chandu Enactment is very significant, since it is so frequently employed by legal draftsmen to indicate that *mens rea* is a necessary element in a criminal offence of the same nature as those created by this section.

It is clear, however, that the state of mind of any person convicted of an offence under section 9 should be taken into consideration in assessing the punishment to be imposed; and it seems to me that a reasonable possibility of there being an absence of such *mens rea* should be taken into consideration as well as the probability or certainty of such absence. Of course, a mere possibility, even though reasonable, will not operate in favour of an accused person to the same extent as a certainty or even a probability: it is all a question of degree. To what extent it will so operate is within the discretion of the Magistrate: I am only concerned to point out that he should take it into consideration in the proper exercise of that discretion.

Now in this particular case, though apparently the learned Magistrate considered that there was a reasonable doubt as to whether the appellant had any knowledge of the chandu found in his package, yet nevertheless he seems to have taken the view that unless the appellant could prove conclusively that he had no such guilty knowledge, he was to be punished on the footing that he had it.

For this reason I think that the appellant has made out a case for a re-trial, in order that the principle I have just enunciated may be applied in assessing the punishment to be inflicted for the offence he has, perhaps unwittingly, committed. Such a course would, however, inevitably involve much inconvenience and expense; and I have therefore decided to re-assess his punishment myself in the light afforded by the record of this case. The appellant's conviction will stand, but the fine inflicted on him will be reduced from $50 to $10, and the sentence of rigorous imprisonment in default of payment will also be reduced from one month to one week.

Appeal dismissed but sentence varied.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

November 8, 1937.

LEE YEE HENG.....Appellant

against

PUBLIC PROSECUTOR.....Respondent

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 74 of 1937]

Opium and Chandu Enactment (Cap. 134)—Rule 17 of Registration of Chandu Smokers Rules—Sale of Chandu—Record of—Register—Power of Commissioner to impose the duty of making the record.

Rule 17 of the Registration of Chandu Smokers Rules does not require that every separate purchase of chandu by a registered smoker should be separately recorded in the register. It is sufficient if one entry is made of the total amount of his purchase in one day.

The rule does not give the Commissioner power to impose the legal duty of recording purchases in a register.

MAGISTRATE'S CRIMINAL APPEAL.

J. T. Tosswill for appellant.

M. C. Hay, Acting Deputy Legal Adviser, for Public Prosecutor.

CUSSEN, J.—The appellant was charged in the Court of the Magistrate, Kuala Lumpur, with an offence under Rule 17 of the Registration of Chandu Smokers Rules, punishable under section 34 of the Opium and Chandu Enactment (Chapter 134). He was convicted and fined $50/- or in default two months rigorous imprisonment.

The charge was as follows:—

> "That on July 7th, 1937, you being Clerk-in-Charge of Ampang Government Chandu Shop failed to record in the register of such shop every purchase of chandu from such Government Chandu Shop and that you thereby committed an offence under Rule 17 of the Registration of Chandu Smokers Rules, punishable under Section 34 (Chapter 134)."

Rule 17 reads:

> "Every purchase of chandu from a Government Chandu Shop shall be recorded in a register to be kept at such shop and also in the registration card of the registered smoker or authorised consumer in the manner required by the Commissioner."

The case for the prosecution is that on 7th July, 1,797 tubes of chandu were sold at the Ampang Government Chandu Shop, but that only sales to the amount of 745 tubes were recorded in the "register" and that, therefore, the appellant has omitted to record the sale of 1,052 tubes,

and so has omitted to comply with the provisions of Rule 17.

The first ground of appeal is that there is no or no sufficient evidence of the purchase of the chandu alleged. But there is a clear record in the appellant's own book—Exhibit B—kept by him and the entry signed by him that 1,797 tubes of chandu were sold on the 7th July—and of course every sale means a purchase. This ground, in my opinion, fails.

The next ground of appeal which calls for consideration is that the Exhibits D, E, F and G are not the "registers" referred to in Rule 17 for the reason that these do not contain a separate record of every purchase of chandu because (as is admitted) when one registered smoker makes two or more purchases in one day, an entry is made only of the total amount of his purchases, and that, therefore, "every purchase" is not recorded as required by the rule.

I do not think that this argument is sound, for even if the rule, properly interpreted, did require each separate purchase to be recorded separately (and I do not myself consider such a strict interpretation is correct) yet the facts that some entries are not made in strict accordance with the rule cannot alter the fact of these documents "D," etc., being the registers if they are in fact the registers.

"D," etc., consist of a number of separate "ledger-sheets" filed in a cover, each "ledger-sheet" being in respect of a single registered smoker and containing an entry of the daily purchase of chandu by him.

These "ledger-sheets" are printed forms. They do not bear the name of "register" and it can only be claimed that they do form the register referred to in Rule 17 because they do in fact contain a record of "every purchase" of chandu from the shop.

Counsel for the appellant puts forward the argument that, on the ground, it might be claimed that the daily tally sheets, Exhibits A1-A2, have a better right to be taken as the "register" under the rule, in so much as they do contain separate entries of every purchase of chandu.

That is certainly an argument of some force. But it is, I think, immaterial in this case, for even if the tally sheets be taken to be the register, the omitted purchases, the subject matter of the charge, are omitted from the tally sheets, Exhibits A1-A2, just as they are omitted from the "ledger-sheets" "D," etc. But I may say that, in my opinion, the book or folio of the ledger-sheets is more conformable to the nature of a "register" than the daily tally sheets.

I conclude, therefore, that although the matter of these "registers" is not as clearly defined and stated as is desirable where the failure to make entries is made an offence punishable by heavy fine and imprisonment in default, nevertheless the defects, so far as they exist, are not in my opinion substantial enough to enable the appellant to succeed on that ground.

The last ground of appeal is that there was no evidence before the Magistrate of the "manner" in which the "Commissioner" required the purchases to be recorded.

Now it is to be noted that Rule 17 does not state the person on whom the duty of recording purchases in a register is placed, the failure to fulfil which is an offence punishable under section 34 of the Enactment.

This is the more to be remarked when contrasted with other rules imposing duties such as Rule 2 (ii), Rule 6 (ii) and Rule 15, which are also rules as to the keeping of registers and which state the persons on whom the legal duty is imposed (i.e., in the case of Rule 2 (ii) and Rule 6 (ii) it is the Clerk-in-Charge of the Government Chandu Shop and in the case of Rule 15 it is the commissioner).

Now Rule 17 empowers the Commissioner to decide in what manner every purchase of chandu is to be recorded in a register, but does that also empower him to say who shall do so, i.e., to place on a particular person the duty to record in that manner?

It would appear that the power to say how a thing is to be done does not include the power to say who is to do it; certainly not where a serious legal liability attaches to failure to do so.

There is no reason why, as in the case of Rule 2 (ii) and Rule 6 (ii), the words "by the Clerk-in-Charge of the Government Chandu Shop" should not have been inserted in Rule 17 after the word "recorded."

In my opinion the wording of the rule fails to give the Commissioner power to impose the legal duty on the Clerk-in-Charge. (This particular point has not been raised in the appeal).

As regards the question of whether there was evidence before the Magistrate as to the "manner required by the Commissioner" I am of opinion that there was not such proof as is necessary in a criminal case. The documents adduced, i.e., the instructions "H1" and "H2" contain nothing to show that they are prescribed by the Commissioner; and the oral evidence of Mr. Jeffries is of the nature of "hearsay" and so is not relevant as proof.

For these reasons this appeal is allowed and the conviction and sentence set aside.

Appeal allowed.

Finding and sentence reversed.